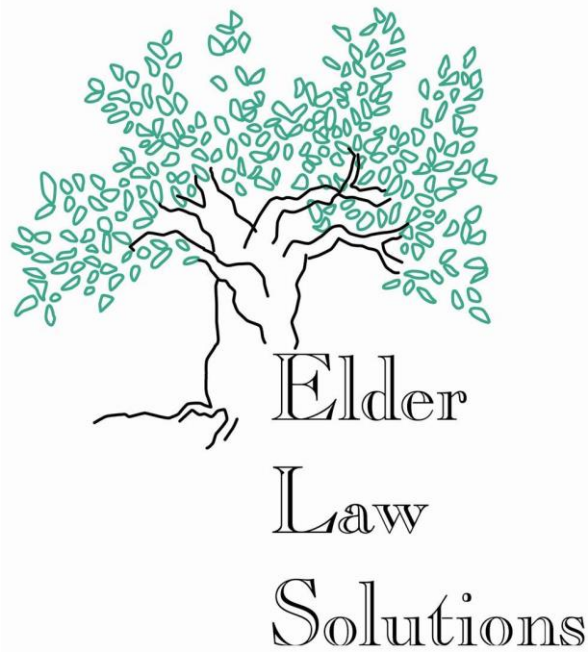


The Consumer's Guide to Medicaid Planning and Division of Assets



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Do You Qualify For Financial Assistance For Nursing Home Care?

Introduction

The decision to move a family member or loved one into a nursing home is one of the most difficult decisions you can make. Perhaps the move is being made because the family member can no longer care for himself or herself...or has a progressive disease like Alzheimer's...or has had a stroke or heart attack. No matter the reason, those involved are almost always under great stress. At time like these, it is important for you to pause, take a deep breath and understand that there are things you can do. Good information is available and you can make the right choices for you and your loved one.

This Consumer's Guide to Medicaid Planning and Division of Assets is designed to help provide you with information and answers to some of the questions you will encounter. There are question that we, as Elder Law attorneys, and nursing home professionals, deal with on a daily basis. Our clients have found this guide to be a valuable resource, and we hope you will find it useful too.

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Americans are living longer than ever before. At the turn of the 20th century, the average life expectancy was about 47 years. Now, as we venture further into the 21st century, life expectancy has almost doubled. As a result, we face more challenges and transitions in our lives than those who came before us. One of the most difficult transitions people face is the change from independent living in his or her own home or apartment to living in a long term care facility or “nursing home.” There are many reasons why this transition is so difficult. One is the loss of home...a home where the person lived for many years with a lifetime of memories. Another is the loss of independence. Still another is the loss of the level of privacy we enjoy at home, since nursing home living is often shared with a roommate. Most people who make the decision to move to a nursing home do so during a time of great stress. Some have been hospitalized after a stroke, some have fallen and broken a hip, still others have progressive dementia, like Alzheimer’s disease and can no longer be cared for in their own homes. Whatever the reason, the spouse or relative who helps a person transition into a nursing home during time of stress faces the immediate dilemma of how to find the right nursing home. The task is no small one, and a huge sigh of relief can be heard when the right home is found and the loved one is moved into the nursing home. For many, the most difficult task is just the beginning: How to cope with nursing home bills that may total \$10,000 to \$12,000 per month or more?

How to Pay for Nursing Home Care

One of the things that concerns people most about nursing home care is how to pay for that care. There are basically four ways that you can pay the cost of a nursing home:

1. Long-Term Care Insurance - If you are fortunate enough to have this type of coverage, it may go a long way toward paying the cost of the nursing home. Unfortunately, long term care insurance has only started to become popular in the last few years and most people facing a nursing home stay do not have this coverage.

2. Pay with Your Own funds - This is the method many people are required to use at first. Quite simply, it means paying for the cost of a nursing home out of your own pocket. Unfortunately, with nursing home bills averaging between \$6,500 and \$8,000 per month in our area, few people can afford a long-term stay in a nursing home.

3. Medicare - This is the national health insurance program primarily for people 65 years of age and older, certain younger disabled people, and people with kidney failure. Medicare provides short-term assistance with nursing home costs, but only if you meet the strict qualification rules.

4. Medicaid - This is a federal and state funded and state administered medical benefit program which can pay for the cost of the nursing home if certain asset and income tests are met.

Since the first two methods of private pay (i.e. using your own funds) and long-term care insurance are self-explanatory, our discussion will concentrate on Medicare and Medicaid.

What About Medicare?

There is a great deal of confusion about Medicare and Medicaid.

Medicare is the federally funded and state administered health insurance program primarily designed for older individuals (i.e. those over age 65). There are some limited long-term care benefits that can be available under Medicare. In general, if you are enrolled in the traditional Medicare plan, and you've had a hospital stay of at least three days, and then you are admitted into a skilled nursing facility (often for rehabilitation or skilled nursing care), Medicare may pay **for a while**. (If you are a Medicare Managed Care Plan beneficiary, a three-day hospital stay may not be required to qualify.)

If you qualify, traditional Medicare **may** pay the full cost of the nursing home stay for the first 20 days and **can** continue to pay the cost of the nursing home stay for the *next* 80 days, but with a \$170.50 deductible (in 2019) per day. Some Medicare supplement insurance policies will pay the cost of that deductible. For Medicare Managed Care Plan enrollees, there may be no deductible for days 21 through 100, as long as the strict qualifying rules continue to be met. So, in the best-case scenario, the traditional Medicare or the Medicare Managed Care Plan may pay up to 100 days for each "spell of illness." In order to qualify for this 100 days of coverage, however, the nursing home resident must be receiving daily "skilled care." (Note: Once the Medicare and Managed Care beneficiary has not received a Medicare covered level of care for 60 consecutive days, the beneficiary may again be eligible for the 100 days of skilled nursing coverage for the next spell of illness.)

While it is never possible to predict at the outset how long Medicare will cover the rehabilitation, from our experience, it usually falls far short of the 100 day maximum. Even if Medicare does cover the 100 day period, what then? What happens after the 100 days of coverage have been used?

At that point, in either case you're back to one of the other alternatives - long-term care insurance, paying the bills with your own assets, or qualifying for Medicaid.

What is Medicaid?

Medicaid is a benefits program, which is primarily funded by the federal government and administered by each state. The rules can vary from state to state.

One primary benefit of Medicaid is that, unlike Medicare (which only pays for skilled nursing), the Medicaid program will pay for long-term care in a nursing home once you have qualified. Medicare does not pay for treatment for all diseases or conditions. For example, a long-term stay in a nursing home may be caused by Alzheimer's or Parkinson's disease, and even though the patient receives medical care, the treatment will not be paid for by Medicare. These stays are called custodial nursing stays. Medicare does not pay for custodial nursing home

stays. In that instance, you will either have to pay privately (i.e. using long-term care insurance or your own funds), or you will have to qualify for Medicaid.

Why Seek Advice for Medicaid?

As life expectancies and long-term care costs continue to rise, the challenge quickly becomes how to pay for these services. Many people cannot afford to pay \$10,000 per month, or more, for the cost of a nursing home, and those who can pay for a while may find their life savings wiped out in a matter of months, rather than years.

Fortunately, the Medicaid Program is there to help. In fact, in our lifetime, Medicaid has become the long-term care insurance of the middle class. But the eligibility to receive Medicaid benefits requires that you pass certain tests on the amount of income and assets that you have. The reason for Medicaid planning is simple. First, you need to provide enough assets for the security of your loved ones - they too may have a similar crisis. Second, the rules are extremely complicated and confusing. The result is that without planning and advice, many people spend more than they should and their family security is jeopardized.

Exempt Assets and Countable Assets: What Must Be Spent?

To qualify for Medicaid, applicants must pass strict tests on the amount of assets they can keep. To understand how Medicaid works, we first need to review what are known as *exempt* and *non-exempt* (or countable) assets. *Exempt assets* are those that Medicaid will not take into account (at least for the time being). In general, the following are the primary exempt assets:

- Home (equity up to \$750,000) – The home must be the principal place of residence. The nursing home resident may be required to show some “intent to return home” even if this never actually takes place.
- Personal belongings and household goods.
- One car or truck.
- Income- producing real estate.
- Burial spaces and certain related items for applicant and spouse.
- Up to \$1,500 designated as a burial fund for both applicant and spouse.
- Irrevocable prepaid funeral contract.
- Value of life insurance if face value is \$1,500 or less. If it does exceed \$1,500 in total face amount, then the cash value in these policies is countable.

All other assets are generally *non-exempt*, and are countable. Basically, all money and property, and any item that can be valued and turned into cash, is a *countable asset* unless it is one of those assets listed above as exempt. This includes:

- Cash, savings, checking accounts, credit union share and draft accounts.
- Certificates of deposit.
- Individual Retirement Accounts (IRA, Keogh plans, 401K, 403B)
- Nursing home accounts.
- Prepaid funeral contracts which can be cancelled.
- Trusts – depending on the terms of the trust.
- Real estate – other than principal residence.
- More than one care.
- Boats or recreational vehicles.
- Stocks, bonds, or mutual funds.
- Land contracts or mortgages held on real estate sold.

While the Medicaid rules themselves are complicated and tricky, it is safe to say that a single person will qualify for Medicaid as long as he or she has only exempt assets plus a small amount of cash and/or money in the bank up to \$2,000.

Some Common Questions

1. I've added my kids' names to our bank accounts. Do they still count?

Yes. The entire amount is counted unless you can prove some or all of the money was contributed by the other person who is on the account. This rule applies to cash assets such as:

- Savings and checking accounts.
- Credit union share and draft accounts.
- Certificates of deposit.
- U.S. Savings Bonds.

2. Can' I just give my assets away?

Many people wonder, can't I give my assets away? The answer is, maybe, but only if it's done just right. The law has severe penalties for people who simply give away their assets to create Medicaid eligibility. In Massachusetts, for every \$5,010 give away during the five years prior to a Medicaid application, creates a one-month period of ineligibility. So, even though the federal Gift Tax laws allow you to give away up to \$15,000 (in 2022) per year *without gift tax consequences*, those gifts could result in a period of ineligibility for Medicaid.

Though some families do spend virtually all of their savings on nursing home care, Medicaid often does not require it. There are a number of strategies, which can be used to protect family financial security.

Division of Assets: Medicaid Planning for Married Couples

Division of Assets is the name commonly used for the Spousal Impoverishment provisions of the Medicare Catastrophic Act of 1988. It applies only to couples. The intent of the law was to change the eligibility requirements for Medicaid where one spouse needs nursing home care while the other spouse remains in the community, i.e. at home. The law, in effect, recognizes that it makes little sense to impoverish both spouses when only one needs to qualify for Medicaid assistance for nursing home care.

As a result of this recognition, division of assets was born. Basically, in a division of assets, the couple gathers all of their countable assets together in a review. Exempt assets, discussed above, are not counted.

The countable assets are then divided in two. The at-home or “community spouse” is allowed to keep one-half of all countable assets up to a maximum of \$137,400 (in Massachusetts). The other half of the countable assets must be “spent down” until less than \$2,000 remains. The amount of the countable assets that the at-home spouse gets to keep is called the Community Spouse Resource Allowance or “CSRA”.

Each state also establishes a monthly income floor for the at-home spouse. This is called the Minimum Monthly Maintenance Needs Allowance or “MMMNA”. This permits the community spouse to keep a minimum of his or her monthly income of \$2,288.75 in 2022 based upon living expenses. If the community spouse does not have at least \$2,288.75 in income, the he or she will be allowed to take the income of the nursing home spouse in an amount large enough to reach the Minimum Monthly Maintenance Needs Allowance (i.e. up to at least \$2,288.75). The nursing home spouse’s remaining income goes to the nursing home. This avoids the necessity for the at home spouse to dip into savings each month, which would result in gradual impoverishment.

The nursing home spouse will also be able to keep \$72.80 per month to cover personal needs, and will also be able to pay the premium for the couple’s supplemental medical insurance.

To illustrate, assume that the at-home spouse receives \$800 per month in social Security. Also assume that his or her needs are calculated to be the minimum of \$2,288.75. With the Social Security, he or she is \$693 short each month.

\$2,288.75	at home spouse’s monthly needs (determined by a formula)
<u>\$ 800.00</u>	at home spouse’s Social Security
\$1488.75	shortfall

In this case, the community spouse will receive \$1488.75 (the shortfall amount) per month from the nursing home spouse’s Social Security and the rest of the nursing home spouse’s income will then go to pay for the cost of his care. This does not mean, however, that there are no planning alternatives that the couple can pursue. Consider the following case studies:

Case Study: Medicaid Planning for Married People

Ralph and Alice were high school sweethearts who lived in Essex, Massachusetts, their entire adult lives. Two weeks ago, Ralph and Alice celebrated their 51st anniversary. Yesterday, Ralph, who has Alzheimer's, wandered away from home. The police found him, hours later, sitting on a street curb, talking incoherently. They took him to a hospital. Now the family doctor has told Alice that she needs to place Ralph in a nursing home. Ralph and Alice grew up during the Depression. They always tried to save something each month. Their assets, totaling \$250,000, not including their house, are as follows:

Savings account.....	\$100,000
CDs.....	\$ 55,000
Money Market Account.....	\$ 85,000
Checking account.....	\$ 15,000
Residence (no mortgage).....	\$350,000

Ralph gets a Social Security check for \$1,500 each month; Alice's check is \$450. Her eyes fill with tears as she says, "At \$10,000 to the nursing home every month our entire life savings will be gone in no time!" What's more, she's afraid she won't be able to pay her monthly bills, because a neighbor told her that the nursing home will be entitled to all of Ralph's Social Security check.

There is good news for Alice. It's possible she will get to keep everything...all of their assets and all of the income...and still have the state Medicaid program pay Ralph's nursing home costs. The process may take a little while, but the end result will be worth it.

To apply for Medicaid, she will have to go through the Division of Medical Assistance, the "DMA". If she does things strictly according to the ways the DMA tells her, she will only be able to keep about half of her assets plus she will be entitled to a minimum monthly income to pay her expenses. But the results can actually be much better than that.

Alice might be able to turn the spend-down amount of roughly \$130,000 into an income stream for her that will increase her income and meet the Medicaid spend down virtually right away. In other words, if handled properly Ralph may be eligible for Medicaid from the first month he goes into the nursing home. Please note this will not work in every case. That is why it is important to have an Elder Law Attorney guide you through the system and the Medicaid process to find the strategies that will be most beneficial in your situation. So, Alice will have to get advice from someone who knows how to navigate the system. But with proper advice she may be able to keep most of what she and Ralph have worked so hard for. This is possible because the law does not intend to impoverish one spouse because the other needs care in a nursing home. This is certainly an example where knowledge of the rules and how to apply them can be used to resolve Alice and Ralph's dilemma.

Of course, proper Medicaid planning differs according to the relevant facts and circumstance of each situation as well as the current state law. For example, some children never gain independence - they remain dependent on their parents. What can be done in such a case?

Case Study: A Trust for a Disabled Child

Margaret and Sam have always taken care of their daughter, Elizabeth. She is 45, has never worked, and has never left home. She is “developmentally disabled” and receives SSI (Supplemental Security Income). They have always worried about who would take care of her after they die. Some years ago, Sam was diagnosed with dementia. His health has deteriorated to the point that Margaret can no longer take care of him. Now she has placed Sam in a nursing home and is paying \$10,000 per month out of savings. Margaret is even more worried that there will not be any money left for the care of Elizabeth.

Margaret is satisfied with the nursing home Sam is in. If he were eligible, Medicaid would pay his bill. However, according to the information she got from the social worker, Sam is \$75,000 away from Medicaid eligibility. Margaret wishes there was a way to save the \$75,000 for Elizabeth after she and Sam are gone. There is.

Margaret can consult an Elder Law Attorney to set up a “*special needs trust*” with the \$75,000 to provide for Elizabeth. As soon as Margaret transfers the money to the trust, Sam will be eligible for Medicaid. Elizabeth won’t lose her SSI benefits, and her security is assured.

Of course, all trusts must be reviewed for compliance with Medicaid rules. Also, failure to report assets is fraud, and when discovered, will cause loss of eligibility and repayment of benefits. Still, some people question making gifts before entering a nursing home.

I Heard I Can Give Away \$15,000 Per Year: Can’t I?

Many people have heard of the *Federal Gift Tax* provision that allows them to give away \$15,000 per year without paying any gift taxes. What they do not know is that this refers to a *Gift Tax* exemption. It is not an absolute right where Medicaid is concerned. Having heard of the exemption, they wonder, “Can’t I give my assets away?” The answer is maybe, but only if it is done within the strict allowances of the law.

So, even though the Federal Gift Tax allows you to give away up to \$15,000 per year without incurring tax, those gifts could result in a period of Medicaid ineligibility for months. Still, some parents want to make gifts to their children before their life savings is all gone. Consider the following case study:

Case Study: Financial Gifts to Children

After her 73-year-old husband, Harold, suffers a paralyzing stroke, Mildred and her daughter, Joan, need advice. Dark circles have formed under Mildred’s eyes. Her hair is

disheveled. Joan holds her hand. “The doctor says Harold needs long-term care in a nursing home,” Mildred says. “I have some money in savings, but not enough. I don’t want to lose my house and all our hard-earned money. I don’t know what to do.” Joan has heard about Medicaid benefits for nursing homes, but doesn’t want her mother left destitute in order for Harold to qualify for them. Joan wants to ensure that her father’s medical needs are met, but she also wants to preserve Mildred’s assets “Can’t Mom just give her money to me as a gift?” she asks. “Can’t she give away \$15,000 a year? I could keep the money for her so she doesn’t lose it when Dad applies for Medicaid.”

Joan has confused Federal Gift Tax law with the issue of *transfers and Medicaid eligibility*. A “gift” to a child in this case is actually a transfer, and Medicaid has very specific rules about transfers.

At the time Harold applies for Medicaid gifts made after February 8, 2006 will be subject to a five-year look back. The state won’t let you just give away your money or your property to qualify for Medicaid. Any gifts or transfers for less than fair market value that are uncovered in the look-back period will cause a delay in Harold’s eligibility for Medicaid. In addition, the law also states that the penalty period on asset transfers will not begin until the Medicaid applicant is in the nursing home and already spent down. This will frustrate the gifting plans of most people. So what can Harold and Mildred do? They may be able to institute a gifting program, save a food portion of their estate and still qualify for Medicaid. But they have to set it up just right. The rules are very “nit-picky”. You should consult a knowledgeable advisor on how this may be done.

Will I Lose My Home?

Many people who apply for medical assistance benefits to pay for nursing home care ask this question. For many, the home constitutes much or most of their life savings. Often, it is the only asset that a person has to pass on to his or her children.

Under the Medicaid regulations, the home is an exempt asset (so long as equity is less than \$750,000 in Massachusetts). This means that it is not taken into account when calculating eligibility for Medicaid. But in 1993, Congress passed a little-debated law that affects hundreds of thousands of families with a spouse or elderly parent in a nursing home. That law requires states to try to recover the value of Medicaid payments made to nursing home residents.

Estate recovery does not take place until the recipient of the benefits dies (or until both spouses are deceased if it is a married couple). Then, federal law requires that states attempt to recover the benefits paid from the recipient’s *probate estate* and in some cases non-probate estate. Generally, the probate estate consists of assets that the deceased owned in his or her name alone without beneficiary designation. The non-probate assets include assets owned jointly or payable to a beneficiary (currently not an issue in Massachusetts.) Some believe the federal law permits states to go even further and recover from non-probate assets, including assets owned jointly or payable to a beneficiary.

About two-thirds of the nation's nursing home residents have their costs paid in part by Medicaid. Obviously, the *Estate Recovery* law affects many families. The asset most frequently caught in the estate recovery web is the home of the Medicaid recipient. A nursing home resident can own a home and receive Medicaid benefits without having to sell the home. But upon death, if the home is part of the probate estate, the state may seek to force the sale of the home in order to reimburse the state for the payments that were made.

Since Medicaid rules are constantly changing, you will need assistance from someone knowledgeable about these rules.

Legal Assistance

Aging person and their family members face many unique legal issues. As you can tell from our discussion of the Medicaid program, the legal, financial, and care planning issues facing the prospective nursing home resident and family can be particularly complex. If you or a family member needs nursing home care, it is clear that you need expert legal help. Where can you turn for that help? It is difficult for the consumer to be able to identify lawyers who have the training and experience required to provide expert guidance during this most difficult time.

Generally, nursing home planning and Medicaid planning is an aspect of the services provided by Elder Law Attorneys. Consumers must be cautious in choosing a lawyer and carefully investigate the lawyer's credentials.

How do you find a law office that has the knowledge and experience you need? You may want to start with recommendations from friends who have received professional help with nursing home issues. Who did they use? Were they satisfied with the services they received? Hospital social workers, Alzheimer and other support groups, accountants, and other financial professionals can also be good sources of recommendations.

In general, a lawyer who devotes a substantial part of his or her practice to nursing home planning should have more knowledge and experience to address the issues properly. Don't hesitate to ask the lawyer what percentage of his or her practice involves nursing home planning. Or you may want to ask how many new nursing homes cases the law office handles each month. There is no correct answer. But there is a good chance that a law office that assists regularly with nursing home placements is likely to be more up-to-date and knowledgeable than an office that helps only occasionally with placements.

Ask whether the lawyer is a member of any Elder Law planning organizations. Is the lawyer involved with committees or local or state bar organizations that have to do with nursing home planning? Does the lawyer lecture on nursing home planning? If so, to whom? If the lawyer lectures to the public, you might try to attend one of the seminars. This should help you decide if this is the lawyer for you.

The leading national organization of Elder Law Attorneys is the National Academy of Elder Law Attorneys (NAELA). Where mere membership in the Academy is open to any lawyer and is no sure sign that the attorneys an experienced Elder Law practitioner, membership does at least show that the lawyer has some interest in the field. In addition, the Academy runs three-day educational sessions twice each year to help lawyers stay current on the latest aspects of elder law and nursing home planning. State chapters of NAELA also offer educational seminars on a regular basis to its members to help them keep up to date on the rules and regulations as applied to the particular state. The Massachusetts chapter of NAELA is very active in monitoring the changes in the laws and lobbying on behalf of its clients. You may want to look for an attorney who is a member of NAELA and has recently attended one or more of its educational sessions.

In the end you must follow your instincts and choose an attorney who knows this area of the law, who is committed to helping others, and who will listen to you and the unique wants and needs of you and your family.

These materials should not be considered as legal advice or opinion on any specific facts or circumstances and are intended for general informational purposes only. A competent attorney should be consulted regarding any particular situation and legal advice.

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